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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 RICK LEE DAUGHERTY,
12 Plaintiff,
13 v.
14 STEVEN SALETROS, et al.,
15 Defendants.
16

Case No. CV 15-06113-DSF (RAO)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

17 This Report and Recommendation is submitted to the Honorable Dale S.
18 Fischer, United States District Judge, under 28 U.S.C. § 636 and General Order
19 05-07 of the United States District Court for the Central District of California.

20 **I. INTRODUCTION**

21 On August 12, 2015, Plaintiff Rick Lee Daugherty (“Plaintiff”), proceeding
22 *pro se*, filed a civil rights complaint under 42 U.S.C. § 1983 (“Complaint”). (Dkt.
23 No. 1.) The Complaint names as defendants Los Angeles Police Department
24 (“LAPD”) Sergeant Werner Flores (“Flores”), LAPD Officer Steven Saletros
25 (“Saletros”), and 10 Does. (*Id.* at 1-3, 10.) Plaintiff’s claims stem from an incident
26 in which Plaintiff allegedly was approached by police while eating lunch, was
27 searched over Plaintiff’s protests, and was hurt while being physically detained.

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1 (*Id.* at 4-9.) Flores and Saletros (collectively, “Defendants”) filed an Answer to the
2 Complaint on September 22, 2015. (Dkt. No. 14.)

3 On September 30, 2015, the Court issued a Scheduling Order. (Dkt. No. 18.)
4 Under that order, the deadline to amend pleadings was set for November 30, 2015;
5 discovery was set to close on February 29, 2016; discovery motions were due by
6 February 29, 2016; and other motions, including motions for summary judgment,
7 were due by May 2, 2016. (*Id.* at 1-2, 4.) The Court also required each party to
8 submit a Status Report by December 30, 2015. (*Id.* at 4.)

9 On December 16, 2015, the Court held a status conference with the parties.
10 Following the status conference, the Court ordered counsel for Defendants to
11 disclose to Plaintiff the names of the other LAPD officers present during the
12 incident described in the Complaint. (Dkt. No. 27.) The Court also extended the
13 deadline for filing amended pleadings to February 3, 2016. (*Id.*)

14 Plaintiff and Defendants both timely filed a Status Report. (Dkt. Nos. 29,
15 30.) Plaintiff’s Status Report detailed discovery that had been undertaken in this
16 action as well as Plaintiff’s efforts to follow up with counsel for the Defendants
17 regarding Defendants’ discovery responses. (Dkt. No. 29 at 1-2.) Defendants’
18 Status Report also indicated that discovery was progressing, and it noted that
19 Defendants were set to depose Plaintiff shortly thereafter. (Dkt. No. 30 at 2.)
20 Defendants’ Status Report also stated that Defendants anticipated filing a motion
21 for summary judgment. (*Id.*)

22 On January 19, 2016, Plaintiff filed a request seeking to have the Court
23 extend the deadline for the filing of an amended complaint. (Dkt. No. 31.)
24 Plaintiff’s request explained that Plaintiff still had not received the names of other
25 LAPD officers present during the incident alleged in the Complaint. (*Id.* at 2-3.)

26 On January 22, 2016, Plaintiff filed an Amended Pleading for Money
27 Demanded in Complaint (“Amended Pleading”), which adjusted the amount of

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1 damages that Plaintiff sought in the present action. (Dkt. No. 32.) Plaintiff also
2 filed a request for a jury trial that same day. (Dkt. No. 34.)

3 On February 2, 2016, Plaintiff filed a Note to Court of Deposition. (Dkt. No.
4 36.) Plaintiff's deposition was apparently rescheduled at some point, and Plaintiff's
5 Note explained that Defendants sought to move the deposition to a later date on the
6 day that it was supposed to go forward. (*Id.* at 1.) Plaintiff's Note also asserted
7 that Plaintiff was kept waiting past the scheduled start time of the deposition and so
8 he left the location where it was to take place. (*Id.* at 2.)

9 On February 5, 2016, Defendants filed a motion to dismiss Plaintiff's
10 Amended Pleading, requesting in the alternative that the Court strike it from the
11 docket. (Dkt. No. 38.) On February 8, 2016, the Court ordered counsel for
12 Defendants to provide to Plaintiff the names of other LAPD officers present during
13 the incident alleged in the Complaint. (Dkt. No. 40.) The Court also extended the
14 deadline to amend pleadings and add parties to March 15, 2016. (*Id.*)

15 On February 11, 2016, Plaintiff filed a Request for Default Contempt of
16 Court, apparently in response to Defendants' motion to dismiss. (Dkt. No. 41.)
17 Among other things, Plaintiff asserted that he still had not received the names of
18 other LAPD officers as he had requested, and he complained that counsel for the
19 Defendants had delayed in responding to his discovery requests. (*Id.* at 2-3.)
20 Defendants filed a reply on February 12, 2016. (Dkt. No. 43.)

21 On March 4, 2016, the Court denied Defendants' motion to dismiss the
22 Amended Pleading but granted Defendants' motion to strike. (Dkt. No. 45.) The
23 Court's order explained that the Amended Pleading did not comply with the Local
24 Rules. (*Id.* at 1-2.) The Court noted that the deadline for Plaintiff to file an
25 amended pleading was March 15, 2016. (*Id.* at 2.)

26 On March 11, 2016, Plaintiff filed a motion to extend the deadline to file an
27 amended complaint, stating that he was still working to obtain from Defendants'

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1 counsel the information regarding other LAPD officers that he desired. (Dkt. No.
2 46.) The Court granted Plaintiff an extension to March 30, 2016. (Dkt. No. 48.)

3 On March 30, 2016, Plaintiff filed his First Amended Complaint (“FAC”)
4 (Dkt. No. 49). The FAC named as additional defendants Sergeant David Podesta,
5 Sergeant Juhee Kim, Officer Mario Ramirez, and Officer Raul Ramos. (*Id.* at 1.)
6 Plaintiff also filed a proof of service indicating that he had served the FAC by mail
7 on Defendants’ counsel. (Dkt. No. 50.) Defendants filed an Answer to the FAC on
8 April 12, 2016. (Dkt. No. 51.) The other defendants, newly added in the FAC,
9 have not responded to the FAC, although it appears they may not have been
10 properly served.

11 Following Defendants’ Answer, the Court did not receive any further filings
12 from either party for several months. On September 15, 2016, the Court ordered
13 the parties each to file a Status Report by September 29, 2016, updating the Court
14 on the status of this action. (Dkt. No. 52.)

15 On September 29, 2016, Defendants filed their Status Report. (Dkt. No. 53.)
16 However, the Court did not receive any submission from Plaintiff. Rather, on
17 October 7, 2016, the Court’s September 29 order, which the Clerk’s Office had
18 mailed to Plaintiff’s address of record, was returned to the Court by the Postal
19 Service. (Dkt. No. 54.) The returned mail was stamped “INSUFFICIENT
20 ADDRESS” and “UNABLE TO FORWARD.” (*Id.*)

21 On October 13, 2016, the Court issued an order reminding Plaintiff that
22 Local Rule 41-6 requires *pro se* plaintiffs to keep the Court apprised of their current
23 address. (Dkt. No. 55.) The Court ordered Plaintiff to notify the Court in writing
24 of his current address on or before October 27, 2016, and warned Plaintiff that the
25 failure to do so would result in a recommendation that this action be dismissed for
26 failure to prosecute. (*Id.*) The Court did not receive any submission from Plaintiff
27 prior to do the deadline.

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1 To date, the Court has received neither a Status Report nor a current address
2 from Plaintiff.

3 Given the foregoing, and for the reasons below, the Court recommends that
4 Plaintiff's Complaint be **DISMISSED** without prejudice.

5 **II. DISCUSSION**

6 Federal Rule of Civil Procedure 41(b) grants district courts *sua sponte*
7 authority to dismiss actions for failure to prosecute or for failure to comply with
8 court orders. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-31, 82 S. Ct. 1386, 8 L.
9 Ed. 2d 734 (1962); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-63 (9th Cir. 1992).
10 "District courts have the inherent power to control their dockets and, [i]n the
11 exercise of that power they may impose sanctions including, where
12 appropriate, . . . dismissal of a case." *Ferdik*, 963 F.2d at 1260 (internal quotation
13 marks omitted).

14 In determining whether to dismiss an action for failure to prosecute or for
15 failure to comply with court orders, a court must weigh five factors:

- 16 (1) the public's interest in expeditious resolution of litigation;
- 17 (2) the court's need to manage its docket;
- 18 (3) the risk of prejudice to defendants/respondents;
- 19 (4) the availability of less drastic alternatives; and
- 20 (5) the public policy favoring disposition of cases on their merits.

21 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

22 Here, the first factor (the public's interest in expeditious resolution of
23 litigation) and second factor (the Court's need to manage its docket) strongly favor
24 dismissal. The Court attempted to avoid this outcome by providing Plaintiff time to
25 update his address following Plaintiff's failure to follow a Status Report. Plaintiff
26 has not responded to the Court's September 15, 2016, order requiring the parties
27 each to file a Status Report, or to the Court's October 13, 2016, order requiring
28 Plaintiff to notify the Court of his current address. Approximately seven months

1 have now passed since Plaintiff's last submission related to this matter. (*See* Dkt.
2 Nos. 49, 50 (FAC and accompanying proof of service, filed March 30, 2016).)
3 Plaintiff's "noncompliance has caused [this] action to come to a complete halt,
4 thereby allowing [him] to control the pace of the docket rather than the Court."
5 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (internal quotations
6 marks omitted). His inaction frustrates the public's interest in the expeditious
7 resolution of litigation and the Court's need to manage its docket.

8 The third factor (the risk of prejudice) requires the defendant to show that the
9 plaintiff's actions impaired its ability to proceed to trial or threatened to interfere
10 with the rightful decision of the case. *See Pagtalunan*, 291 F.3d at 642. "Limited
11 delays and the prejudice to a defendant from the pendency of a lawsuit are realities
12 of the system that have to be accepted, provided the prejudice is not compounded
13 by 'unreasonable' delays." *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984).
14 However, "the risk of prejudice to the defendant is related to the plaintiff's reason
15 for defaulting in failing to timely" act. *Yourish*, 191 F.3d at 991. The better the
16 reason, the less likely it is that the third factor will favor dismissal. *See id.* (finding
17 that the plaintiff's "paltry excuse for his default on the judge's order indicate[d] that
18 there was sufficient prejudice to Defendants from the delay that [the third] factor
19 also strongly favor[ed] dismissal"). The Ninth Circuit has stated that "the failure to
20 prosecute diligently is sufficient by itself to justify a dismissal, even in the absence
21 of a showing of actual prejudice to the defendant from the failure." *Anderson v. Air*
22 *W., Inc.*, 542 F.2d 522, 524 (9th Cir. 1976); *see also In re Eisen*, 31 F.3d 1447,
23 1452-53 (9th Cir. 1994) (quoting *Anderson*). However, while prejudice is
24 presumed for a failure to prosecute, the presumption may be rebutted, and a court
25 should consider whether there has been a showing that no actual prejudice has
26 occurred. *Anderson*, 542 F.2d at 524.

27 Here, Plaintiff has now failed to respond to two of this Court's orders.
28 Plaintiff's failure to participate in this litigation stands in striking contrast to his

1 conduct prior to the filing of the FAC, indicating a loss of interest in the matter.
2 Defendants indicate that discovery is only partially complete and that they intend to
3 file a motion pursuant to Federal Rule of Civil Procedure 12(c) and, if necessary, a
4 motion for summary judgment. (Dkt. No. 53 at 2.) Defendants' ability to defend
5 this case is hampered by Plaintiff's apparent failure to participate, and Defendants
6 should not be forced to defend against claims that Plaintiff is not actively pursuing.
7 The Court therefore finds that the third factor weighs in favor of dismissal.

8 The fourth factor (the availability of less drastic alternatives) strongly
9 supports dismissal. As noted above, the Court attempted to avoid dismissal by
10 ordering the parties to submit Status Reports, and then by requiring Plaintiff to
11 update his address with the Court. Despite the Court's warning that failure to
12 respond could result in a recommendation that this action be dismissed, Plaintiff
13 has failed to comply with the Court's orders. The Court deems it imprudent to wait
14 any longer for Plaintiff to exhibit an interest in prosecuting this action with the
15 requisite amount of diligence. *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir.
16 1986) (a district court "need not exhaust every sanction short of dismissal
17 before . . . dismissing a case"). The Court also notes that it is recommending
18 dismissal *without prejudice*, a significantly lesser sanction than dismissal with
19 prejudice.

20 The fifth factor (the public policy favoring disposition on the merits) weighs
21 against dismissal, as it almost inevitably will when an action is dismissed without
22 reaching the merits. *Pagtalunan*, 291 F.3d at 643.

23 In sum, four out of the five factors support dismissal, and at least three of the
24 five factors *strongly* support dismissal. Accordingly, dismissal is appropriate at this
25 juncture. *See Yourish*, 191 F.3d at 990 (dismissal is appropriate where three of the
26 five factors strongly support dismissal).

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1 **III. RECOMMENDATION**

2 For the reasons above, IT IS RECOMMENDED that the District Court issue
3 an Order: (1) accepting and adopting this Report and Recommendation; and
4 (2) dismissing Plaintiff's complaint without prejudice for failure to prosecute and to
5 comply with Court orders.

6
7 DATED: October 28, 2016

/S/

8 ROZELLA A. OLIVER
9 UNITED STATES MAGISTRATE JUDGE
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11 **NOTICE**

12 Reports and Recommendations are not appealable to the Court of Appeals,
13 but may be subject to the right of any party to file objections as provided in Local
14 Civil Rule 72 and review by the District Judge whose initials appear in the docket
15 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
16 should be filed until entry of the Judgment of the District Court.
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